

STATE OF MICHIGAN
COURT OF APPEALS

CENTRAL MICHIGAN LUMBER,

Plaintiff-Appellant,

v

DHAFIR DALALY and DEBRA DALALY,

Defendants/Cross-Defendants-
Appellees,

and

ERNEST SOLOMON,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
February 22, 2007

No. 264515
Oakland Circuit Court
LC No. 2003-046994-CK

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting the Dalaly defendants'¹ motion for directed verdict and denying plaintiff's motion to amend the pleadings. We reverse and remand for further proceedings. This case arose after the Dalaly defendants agreed to purchase, on credit, about \$64,000 worth of building material from plaintiff. When the Dalaly defendants paid only about \$51,000 against the line of credit, plaintiff filed this lawsuit, but did not attach any written agreement to its complaint. The Dalaly defendants listed the affirmative defense that plaintiff failed to comply with MCR 2.113, which requires a plaintiff to attach the allegedly breached contract to the complaint. At the conclusion of plaintiff's proofs at trial, the Dalaly defendants again raised the issue, arguing that plaintiff's failure to attach the written contract to the complaint warranted a directed verdict. The trial court granted the Dalaly defendants' motion for directed verdict and later denied plaintiff's motion for reconsideration and amendment of the complaint.

¹ The lower court records incorrectly spelled defendant Debra Dalaly's name as "Deborah," but we see no reason to perpetuate the error. Defendant Solomon was granted a directed verdict, and that decision is not being appealed.

Plaintiff argues that the trial court erred by granting a directed verdict to the Dalalys. We agree. A trial court's decision regarding a party's motion for a directed verdict is reviewed de novo. *Smith v Foerster-Bolser Construction, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). When reviewing a directed verdict, we consider all evidence that was presented before the motion was made, and we view that evidence in the light most favorable to the nonmoving party to determine the existence of a material question of fact. *Id.* at 427-428.

Where a claim is premised on a written instrument, a copy of the instrument must be attached to the pleading. MCR 2.113(F)(1). "The purpose of any requirement of specificity in pleadings is to provide a defendant with sufficient notice to prepare a defense to the charges." *Belobradich v Sarnsethsiri*, 131 Mich App 241, 247; 346 NW2d 83 (1983). However, a complaint may be amended to conform to the facts revealed at trial in accordance with MCR 2.118.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment. [MCR 2.118(C)(1).]

Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2). Therefore, when evidence not within the issues raised by the pleadings is not objected to at trial, there is no error in its admission because it could have been added by amendment under MCR 2.118(C)(1). *Belobradich, supra* at 248. If there is an objection, then an amendment is not allowed unless the moving party demonstrates that an amendment would not prejudice the objecting party. *Berwald v Kasal*, 102 Mich App 269, 274; 301 NW2d 499 (1980); MCR 2.118(C)(2). A defendant may not claim surprise by the admission of evidence that was revealed and thoroughly explored during discovery. *Id.*; *Belobradich, supra* at 248-249. When a trial court dismisses an action for a deficient pleading under MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings under MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). "A motion to amend a complaint should be denied only for such specific reasons as futility, failure to cure deficiencies by prior amendments, undue delay, prejudice to the nonmoving party, bad faith, or dilatory motive by the moving party." *Mallory v City of Detroit*, 181 Mich App 121, 128; 449 NW2d 115 (1989).

In this case, the record demonstrates that the trial court acted under the mistaken belief that plaintiff's failure to attach the contract to the complaint rendered dismissal mandatory under the court rules. On the contrary, the procedural device employed by the trial court to dismiss the case (directed verdict) only applied if the evidence failed to substantiate plaintiff's claim. In this case, plaintiff introduced the relevant contract without objection and provided overwhelming evidence that it was a binding agreement and that the Dalalys breached it. The trial court did not strike the written agreement or exclude it from evidence, so it should not have granted a directed verdict to the Dalalys. *Smith, supra*. Instead, dismissal for deficient pleadings is ordinarily granted in accordance with MCR 2.116(C)(8), including its notice provisions of MCR 2.116(B)(2) and the amendment provisions found in MCR 2.116(I)(5). The record in this case demonstrates that the contract at issue was presented and acknowledged at Dhafir Dalaly's

deposition and attached to plaintiff's trial brief as a controlling document. Yet the Dalalys did not raise any objection or legal issue regarding the document until the close of plaintiff's proofs.

The complaint alleged that the Dalalys agreed to purchase various lumber products for construction of a house, that the contract established the choice of venue, that the Dalalys bought the construction materials on a line of credit, that plaintiff timely delivered materials in fulfillment of its contractual obligation, and that plaintiff was only partially compensated for the services rendered. The credit application setting forth the terms and conditions that all three defendants signed, and the corresponding acceptance letter granting the Dalalys a \$70,000 line of credit, were both produced during discovery. Although the Dalalys later claimed prejudice by surprise, they never moved for a more definite statement pursuant to MCR 2.115(A), and did not move for summary disposition within the time limit set for dispositive motions. Moreover, at trial they acknowledged that plaintiff's complaint asserted a contract action, and they never pointed to a different signed agreement that they perhaps confused for the relevant contract. The complaint's account of the written agreement's contents persuades us that the Dalalys' claims of ignorance and surprise are disingenuous. In light of this record, we are not persuaded that the Dalalys did not know that plaintiff would rely on a written agreement or that some confusion about the contents of the agreement existed at the time of trial. Moreover, Dhafir admitted that he did not pay all the money he owed under the contract, so the Dalalys fail to persuade us that plaintiff's motion to amend its complaint is unjust.² The written agreement was never challenged, was admitted into evidence at trial, and was almost concededly breached. Under the circumstances, the Dalalys' surprise or prejudice was secondary to the greater issue of justice. MCR 2.118. There was no evidence that plaintiff acted in bad faith, *Mallory, supra*, and the Dalalys did not suffer any conceivable prejudice from the written instrument's temporary absence from the record. Because the trial court applied the wrong legal standard on the basis of a misapprehension of its obligations under the court rules, it abused its discretion in denying plaintiff's motion to amend the complaint to conform to the evidence. See *Bynum v ESAB Group, Inc.*, 467 Mich 280, 283; 651 NW2d 383 (2002).

Plaintiff also asserts that we should assign a different judge on remand, claiming that the trial judge's erroneous findings and legal conclusions demonstrate hostility toward plaintiff and plaintiff's counsel. This argument is without merit. A trial judge is presumed to be impartial, and a judge's prior expression on a point of law does not establish personal bias that would require disqualification. *VanBuren Twp v Garter Belt, Inc.*, 258 Mich App 594, 601-602; 673 NW2d 111 (2003). The trial judge's actions in this case clearly stemmed from a misreading of the court rules' requirements, not from any deep-seated prejudice or bias. We are confident that the trial judge can set aside any previously expressed opinions and fairly decide the case on remand. *Id.*

² Notably, justice is even better served by amendment in this case, because there were unanswered issues regarding whether plaintiff attached the written agreement to the original complaint (which was filed in a different venue) or provided the Dalalys a copy of the agreement at its signing.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot